BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Cost-Based Terminating Compensation	)	CC Docket Nos. 95-185 and 96-98
For CMRS Providers	)	WT Docket No. 97-207

REPLY COMMENTS OF THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION

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The Cellular Telecommunications & Internet Association ("CTIA")[1] hereby submits its Reply Comments in the above captioned proceeding.[2]

I. Introduction

The Commission's rules concerning the calculation of the reciprocal compensation to which a wireless carrier is entitled did not change on May 9th with the issuance of the Joint

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1 CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

2 Cost-Based Terminating Compensation For CMRS Providers, CC Docket Nos. 95-185 and 96-98, WT Docket No. 97-207, *Application for Review of SBC Communications Inc.* (filed June 8, 2001)("Application for Review").

Letter.[3] Recognition of this fact is critical to the appropriate consideration of the Application for Review, and the comments and oppositions filed in response to it.

II. The Joint Letter Is Procedurally Sound As An Interpretative Ruling.

The Administrative Procedure Act ("APA") requires federal agencies to publish notice of a proposed rule in the Federal Register and to receive and consider public comment on the proposed rule before adopting and publishing the final rule in the Federal Register.[4] The APA expressly exempts interpretative rulings and statements of policy from the notice, comment and publication requirements.[5] The APA does not define an "interpretative rule."

The courts, though, have sought to distinguish interpretative rules from the substantive rules that require adherence to notice, comment, and publication requirements. Although "the spectrum between a clearly interpretive rule and a clearly substantive one is a hazy continuum,"[6] the D.C. Circuit has been particularly active in seeking to provide clarity. For example, it has explained that:

> [t]he distinctive characteristics of interpretative rulings, as contrasted with so-called regulations, have long been recognized. Administrative officials frequently announce their views as to the meaning of statutes or regulations. Generally speaking, it seems to be established that 'regulations,' 'substantive rules' or 'legislative rules' are those which create law, usually implementary to an

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3 Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, and Dorothy T. Attwood, Chief, Common Carrier Bureau, to Charles McKee, Senior Attorney, Sprint PCS, CC Docket Nos. 95-185 and 96-98, and WT Docket No. 97-207 (dated May 9, 2001)("Joint Letter").

4 5 U.S.C. § 553.

5 5 U.S.C. §§ 553(b)(3)(A) and 553(d)(2).

6 American Hospital Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

> existing law; whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means.[7]

The Commission itself has encountered this issue on several occasions quite analogous to the instant matter. For example, when the Commission stated -- without submitting the matter for public notice and comment -- that its rules did not require cellular carriers to establish separate wholesale and retail operations, opponents who believed that structural separation already had been ordered appealed, claiming that the statement substantively changed the Commission's rules and was subject to the rulemaking requirements of the APA. The D.C. Circuit disagreed, holding that the Commission's statement merely resolved an ambiguity in the agency's rules and therefore, as an interpretive ruling, could be issued without notice and comment.[8] In a separate matter, the Commission interpreted its financial-interest rules as not prohibiting broadcast networks from acquiring interests in nonbroadcast uses of programming, such as videocassettes. Viacom appealed, claiming that the FCC's decision substantively amended the financial-interest rules without implementing the rulemaking procedures required by the APA.[9] Again, the D.C. Circuit disagreed, holding that the Commission's action was "not a rule-making but an

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7 Gibson Wine Co. v. Snyder, 194 F.2d 329, 331 (D.C. Cir. 1952).

8 Cellnet Communication, Inc. v. FCC, 965 F.2d 1106, 1111 (D.C. Cir. 1992)("As the *Notice* clarified, rather than changed, the rules, the Commission properly issued it without notice and opportunity for comment.")(citing Chemical Waste Management, Inc. v. EPA, 869 F.2d 1526, 1534 (D.C. Cir. 1989)).

9 The issue arose in response to a CBS Petition for Declaratory Ruling. The Commission sought and received comments on the CBS Petition. However, the NPRM originally proposing the rule (prior to the CBS Petition) did not discuss "as a matter of concern" the specific nonbroadcast rights at issue in the CBS Petition. Viacom International Inc. v. FCC, 672 F.2d 1034, 1037 (D.C. Cir. 1982). The FCC characterized its decision as interpretative and claimed that its issuance did not trigger the APA rulemaking procedures. Id. at 1039-40.

interpretation of an existing rule, and did not require adherence to the rule-making procedures of the APA."[10] The court explained that:

> The choice between rule-making or declaratory order is primarily one for the agency regardless of whether the decision may affect policy and have general prospective application, and an agency's conclusion that its order is interpretative "in itself is entitled to a significant degree of credence." Certainly interpretation of regulations by declaratory ruling is "well within the scope of the familiar power of an agency . . . ."[11]

Most recently, the Tenth Circuit explained that "[i]f the rule in question merely clarifies or explains existing law or regulations, it will be deemed interpretive."[12]

The foregoing cases and others render it abundantly clear that the clarification provided by the Joint Letter -- a classic example of an agency's interpretative ruling -- did not constitute a rule that would trigger the notice and comment requirements of the APA. Consequently, procedural challenges to this interpretative ruling on the basis of the APA's rulemaking requirements are misplaced.

The Joint Letter's classification as an interpretative ruling does not eviscerate its utility. Qwest mischaracterizes a policy statement as "not set[ting] standards of conduct to be followed."[13] To be sure, a policy statement or interpretative ruling does not carry with it the

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10 Id. at 1042 (citations omitted).

11 Id. (citations omitted).

12 Farmers Telephone Co., Inc. v. FCC, 184 F.3d 1241, 1250 (10th Cir. 1999)(quoting Bailey v. Sullivan, 885 F.2d 52, 62 (3d Cir. 1989) and citing McKenzie v. Bowen, 787 F.2d 1216, 122 (8th Cir. 1986)).

13 Qwest Comments at 4.

binding force of law that attach to an agency's substantive rules.[14] However, as the foregoing cases demonstrate, policy statements and interpretative ruling are properly used to clarify the meaning and application of the agency's substantive rules. Moreover, while they may not carry the weight of substantive rules, policy statements and interpretative rulings are not wholly without authority as Qwest suggests.[15] To the contrary, they offer "a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[16] The Joint Letter itself is an appropriate method of providing guidance to States seeking to interpret and apply the Commission's reciprocal compensation rules.

III. The Application For Review Misreads The Substantive Rules That Provide The Basis For The Joint Letter.

The substantive claims of the Application for Review conflict with established Commission rules and the plain language of the Communications Act. The Application properly concedes that CMRS providers are entitled to overcome the Commission's symmetry presumption with an adequate showing.[17] Yet, quixotically, the Application seeks a Commission

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14 See, e.g., Chrysler Corp. v. Brown, 441 U.S. 281, 314-316 (1979); see also Samaritan Health Service v. Bowen, 811 F.2d 1524, 1529 (D.C. Cir. 1987).

15 With the exception of *Gibson Wine*, the D.C. Circuit cases discussed herein were all decided *after* that same court decided *Pacific Gas and Electric* -- the sole source of binding authority relied upon by Qwest -- and consequently offer a more current and persuasive reflection of the court's view of such issues.

16 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). The Supreme Court explained that "[t]his Court has long given considerable and in some cases decisive weight to . . . interpretative regulations of the Treasury and of other bodies that were not of adversary origin" and that "[t]he weight of such a[n interpretative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Id.

17 Application for Review at 6.

statement that its rules preclude CMRS carriers from including certain traffic sensitive costs from their showing.[18]

The Application's error concerning the substantive nature of the Commission's rules derives from the mistaken assumption that underlies its conclusion. The Application erroneously assumes that functional equivalence[19] between the components of two technologically different networks means that the underlying costs of those network components are equally traffic sensitive. This assumption is incorrect. The Commission has recognized that some CMRS network component costs that permit call termination may vary much more dramatically in relation to usage than do the ILECs' wireline terminating network component costs.[20] Thus far,

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18 Id.

19 The Joint Letter notes that the Commission has considered and rejected the interpretation of it rules, advanced by the Application for Review, that would require wireless network components to be reviewed on the basis of their relationship to wireline network components. See Joint Letter at 2. That the recent summary of these rules by the full Commission arose in the context of a Notice of Proposed Rulemaking is not germane to the procedural or substantive integrity of the Joint Letter. Unquestionably, a proposed rule is simply that: a proposition. It lacks the authority of a rule duly enacted pursuant to the standards of the APA. But the Joint Letter does not cite to proposed rules as its basis of authority. Rather, it cites to the most recent summary of the Commission's existing rules and that summary occurs in an NPRM as an explanation leading up to the questions upon which the NPRM seeks comment. The actual rules are referred to in the footnotes of the NPRM. Recourse to those references demonstrates that the rules upon which the Joint Letter relies are actual and duly promulgated rules of the Commission. By citing to the *Intercarrier Compensation NPRM*, *infra.* n.25, the Joint Letter provides the reader with the convenience of receiving a summary of the rules in one document and grants readers the benefit of knowing that the rules themselves, while they remain valid, are presently under review by the Commission.

20 Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Equal Access and Interconnection Obligations Pertaining to Commercial Radio Service Providers, CC Docket Nos. 95-185 and 94-54, *Notice of Proposed Rulemaking* 11 FCC Rcd 5020 at ¶ 79 (1996)("LEC networks and CMRS networks use different technologies that may have different costs . . . . [A]symmetrical, cost-based rates have the benefit of providing each of the carriers . . . incentives to use

it has declined to identify which particular costs exhibit such a variance, leaving the responsibility for the initial showing to the CMRS providers.[21] CTIA does not here address the merits of the economic cost study provided by Sprint PCS in which it seeks to demonstrate the usage sensitivity of its loop costs. But the Commission has not removed this matter from the table, which is why the Application cannot refer to a Commission rule that precludes CMRS providers from seeking to demonstrate the variable cost structure of the wireless equivalent of loops.

The Commission's approach in the *Local Competition Order* is consistent with its own practice in other areas in which it establishes presumptions (often for the administrative convenience of the agency and the regulated entities) that it permits the regulated entity to rebut.[22] More importantly, it is also consistent with the plain meaning of the Communications

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resources such as interconnection commensurate with the actual cost of those resources.").

21 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98 and 95-185, *First Report and Order*, 11 FCC Rcd 15499 at ¶ 1089 (1996)("If a competing local service provider believes that its cost will be greater than that of the incumbent LEC for transport and termination, then it must submit a forward-looking economic cost study to rebut this presumptive symmetrical rate."); see also id. at ¶ 1091 ("[T]he flexibility given to states may allow carriers . . . with different network architectures to establish rates for terminating calls originating on other carriers' networks that are asymmetrical, if they can show that the costs of efficiently configured and operated systems are not symmetrical and justify different compensation rates, instead of being based on competitors' network architectures.")(emphasis added).

22 See, e.g., Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of The Telecommunications Act of 1996, CS Docket Nos. 97-98 and 97-151, *Consolidated Partial Order on Reconsideration*, FCC 01-170 at ¶¶ 70-71 (rel. May 25, 2001)(establishing a rebuttable presumptive number of attaching entities on a pole to "expedite the process and allow utilities to avert the expense of developing location specific averages").

Act which provides that reciprocal compensation will be just and reasonable only if costs are determined "on the basis of a reasonable approximation of the additional costs of terminating such calls."[23] Consequently, the Joint Letter explained that it understands the agency's rules to state, without limitation, that "the determination of compensable wireless network components should be based on whether the particular wireless network components are cost sensitive to increasing call traffic,"[24] an interpretation with which the full Commission agrees.[25] Rather than seeking to change the effect of the Commission's rules through an Application for Review of the Joint Letter, contentions with these present and effective rules and policies are appropriately submitted in the ongoing *Intercarrier Compensation* rulemaking.

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23 47 U.S.C. § 252(d)(2)(A)(ii).

24 Joint Letter at 2.

25 See Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, *Notice of Proposed Rulemaking*, FCC 01-132 at ¶ 104 (rel. April 27, 2001)("*Intercarrier Compensation NPRM*")("The 'equivalent facility' language of sections 51.701(c) and (d) of the Commission's rules was not intended to require that wireless network components be reviewed on the basis of their relationship to wireline network components. . . . Instead, a cost-based approach -- one that looks at whether the particular wireless network components are cost sensitive to increasing call traffic -- should be used to identify compensable wireless network components. Thus, if a CMRS carrier can demonstrate that the costs associated with spectrum, cell sites, backhaul links, base station controllers and mobile switching centers vary, to some degree, with the level of traffic that is carried on a wireless network, a CMRS carrier can submit a cost study to justify its claim to asymmetric reciprocal compensation that includes additional traffic sensitive costs associated with those network elements.")(citations omitted).

IV. The D.C. Circuit Recently Confirmed The Commission's Authority To Issue Rules Concerning LEC-CMRS Reciprocal Compensation Pricing Arrangements.

The Application points to at least one State PUC decision as support for its mistaken understanding of the Commission's rules.[26] This misinterpretation underscores the utility of the Joint Letter's clarification, but the Texas PUC's substantive conclusions cannot control the Commission's actions in this area. The Commission's authority to determine the pricing arrangements for LEC-CMRS interconnection is unquestionable. The Commission's unique jurisdiction over CMRS interconnection agreements was recognized by the Eighth Circuit, which otherwise viewed the Commission's authority as limited.[27] Just last month, the D.C. Circuit issued a broad ruling that confirmed the Eighth Circuit's prior decision and left no doubt about the Commission's jurisdiction over LEC-CMRS interconnection.[28] The Joint Letter was an appropriate means of clarifying the reciprocal compensation rules of the controlling regulatory body as they apply to LEC-CMRS interconnection.

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[26] Application for Review at 7-8.

[27] Iowa Utilities Bd. v. FCC, 120 F.3d 753, 800 n.21 (8th Cir. 1997), *aff'd in part and rev'd in part sub nom.*, AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366 (1999).

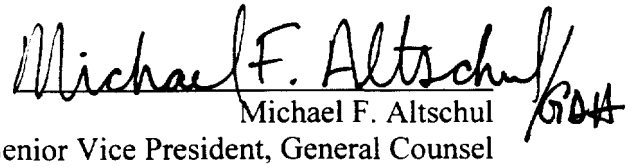
[28] Qwest Corporation v. FCC, No. 00-1376 (June 15, 2001, D.C. Cir.).

V. Conclusion

For the foregoing reasons, CTIA respectfully requests that the Commission deny the Application for Review.

Respectfully submitted,

CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION



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CERTIFICATE OF SERVICE

I, Rosalyn Bethke, do hereby certify that on this 5th day of July, 2001, copies of the attached Reply Comments of the Cellular Telecommunications & Internet Association, filed today in CC Docket Nos. 95-185 and 96-98, and WT Docket No. 97-207, were sent by first-class mail or by hand delivery, as indicated, to the following parties:

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